

13 March 2007

REGULATORY BRANCH MEMORANDUM 2007-01

SUBJECT: Irrigated Wetlands

1. Purpose. To provide guidance for determining whether artificially irrigated wetlands meet the definition of wetlands under the 1987 Corps of Engineers Wetland Delineation Manual, including appropriate regional supplement, and thus are potentially subject to jurisdiction under Section 404 of the Clean Water Act (CWA).

2. Applicability. This memorandum applies to jurisdictional determinations within the Sacramento District for wetlands in areas that are irrigated through artificial sources of water ("artificially irrigated wetlands"). This includes, but is not limited to, areas in rice production.

This memorandum rescinds and replaces Sacramento District Regulatory Branch Memorandum 2003-04 dated 1 October 2003.

3. References.

- a. Section 404 of the Clean Water Act, 33 USC 1344.
- b. 33 CFR Parts 320-331, Regulatory Programs of the Corps of Engineers, November 13, 1986.
- c. 33 CFR 328.3, preamble and definition of "waters of the United States", November 13, 1986.
- d. Corps of Engineers Wetland Delineation Manual, January 1987 and the appropriate regional supplement.

4. Background. In accordance with the preamble to 33 CFR Part 328.3, the Corps generally does not consider artificially irrigated areas, which would revert to upland if the irrigation ceased, to be waters of the United States under Section 404 of the Clean Water Act. To determine whether an artificially irrigated wetland is jurisdictional (i.e., a "water of the U.S.") and therefore subject to regulation under the CWA, the Corps must first determine whether the irrigated wetland meets the criteria contained in the 1987 Corps of Engineers Wetlands Delineation Manual, as well as the regional supplement to this

manual (collectively, "Manual") for identifying and delineating wetlands.

For artificially irrigated wetlands, discontinuing the application of irrigation water may be the best way to verify whether or not wetland characteristics are being sustained solely by the application of irrigation water. However, in some cases, this approach may not be practical. As such, an alternative method for determining whether irrigated wetlands meet the definition of a wetland under the Manual is needed.

The technical methods employed for normal wetland delineations may not be useful for irrigated wetlands. For instance, hydrophytic vegetation can be established and maintained solely by irrigation water. Hydric soils may also fail to provide an accurate representation of natural wetland conditions. In artificially irrigated areas, the presence of hydric soils depends on whether hydric soils were present on the property before irrigation commenced, and the length of time the land has been subject to irrigation. Complicating the situation is a varying time period that irrigation has to be applied to allow for the development of hydric soil characteristics.

Section 404(f) of the CWA exempts from regulation certain discharges of dredged or fill material into waters of the U.S. associated with normal farming, silviculture, and ranching activities. Certain activities associated with the production of rice, cranberries, or other crops grown in wetland conditions fall within the scope of this exemption.¹ In accordance with 33 CFR Part 323.4, such activities must be part of an established (i.e., "on-going") farming operation to fall under this exemption.

The use of Section 404(f) exemptions does not affect Section 404 jurisdiction. For example, the fact that an activity in a jurisdictional wetland is exempted as normal farming practices does not authorize the filling of the wetland for the construction of buildings without a permit. Similarly, a permit would be required for the discharge of dredged or fill material associated with draining a jurisdictional wetland and converting it to dry land. Areas designated "farmed wetlands" or "farmed wetland pasture" by the Natural Resources Conservation Service (NRCS) are generally subject to regulation under CWA Section

¹ Refer to 33 CFR 323.4(a)(1)(iii)(C)(1)(i)-(ii) for specific activities. The 1990 EPA/Corps memorandum on the CWA Section 404 regulatory program and agricultural activities provides additional guidance, including guidance related to rice farming.

404, but certain ongoing farming activities occurring on the site may be exempt under Section 404(f). Areas designated "prior converted cropland" (PC) by NRCS may also be jurisdictional if they have been abandoned and meet wetland criteria. Further, the PC designation applies only as long as the land remains in agricultural use. If land is converted from agricultural use to a non-agricultural use, the PC determination would no longer apply. If wetland conditions exist in accordance with the Manual, any future discharge of dredged or fill material would require authorization under Section 404.

5. Procedure. A property owner/project proponent may choose to discontinue the use of irrigation water as an approach to determining if artificially irrigated wetlands meet the definition of a wetland under the Manual. This may require the cessation of irrigation for two or more growing seasons, although longer time periods may be necessary under drought or extraordinarily wet weather conditions.

When the cessation of irrigation is not practical for the property owner, the following approach will be followed in the Sacramento District:

a. Review current and past aerial imagery and land use information, including maps, to ascertain whether wetlands may have existed on the property prior to its conversion to agriculture.

b. Review information from federal, state, local agencies, as well as the landowner, neighbors, and others who may have knowledge of the hydrologic characteristics of the property and surrounding area. This may include information concerning topographic modifications made to the property, such as "laser-leveling," that altered the hydrologic regime of the site.

c. Review the most current information regarding soils in the area documented by the NRCS or other appropriate agency. The NRCS Soil Survey for the area provides data on soil characteristics, and will usually provide groundwater table and flooding information, as well as information on the type of vegetation found in particular soil types. Once the soil series is identified, determine whether the soil is listed as a hydric soil, or a soil with hydric inclusions, on the local and national hydric soils lists.

d. Check with Federal, state, and local agencies, to determine if any surface or groundwater records for the property

are available for review. This information may indicate the contribution of natural surface or subsurface hydrology on the property or surrounding area.

e. Review documentation from irrigation districts and/or water companies regarding water delivery and use on the property.

f. Review weather information, including the period of record, and determine whether drought or extraordinarily wet conditions exist.

g. Conduct an on-site wetland delineation of the property in accordance with the Manual.

The Sacramento District will make every effort to utilize existing data since soil and hydrology information for a flooded site may be difficult to determine and analyze.

The Sacramento District will work with the property owner/project proponent to gather and review information for a property that has been subject to artificial irrigation. Case-by-case determinations will be made as soon as possible, given existing data/information and permit workload considerations. The Sacramento District will strive to make a jurisdictional determination within 30 days of receipt of a request.

7. Policy. One of the following findings will be made upon completion of the procedure established in (5) above.

a. If there are no positive indicators for vegetation and/or soils or it is obvious that the area would be dry without irrigation based on information obtained and/or field observations, the irrigated wetland does not meet the definition of a wetland under the Manual

b. If positive indicators for all three parameters are present, and the source of natural hydrology (e.g. rainfall runoff, springs, surface flooding, groundwater, etc.) sustaining the wetland can be clearly identified, then the irrigated wetland, in whole or in part, meets the definition of a wetland under the Manual.

c. If there are positive indicators for soils and vegetation, but the relative contribution of irrigation versus natural hydrology in maintaining these conditions cannot be precisely determined, then consideration must be given as to

whether the current condition reflects the "normal circumstances" of the area.

i) If it is determined the area was a wetland prior to being brought into agricultural production, and under normal circumstances would likely continue to meet wetland criteria absent direct application of irrigation water to the property (e.g., hydrology is maintained by natural or artificial means, including groundwater seepage from irrigation ditches that service the surrounding areas), then the irrigated wetland, in whole or in part, meets the definition of a wetland under the Manual.

ii) If it can be demonstrated the area was not a wetland (i.e., upland) prior to being brought into agricultural production, and under normal circumstances would likely continue to exhibit wetland criteria only through direct application of irrigation water, then the irrigated wetland generally would not meet the definition of a wetland under the Manual. However, if the property has been subject to extensive topographic modification (e.g., "laser-leveling") such that wetland conditions would likely remain even if irrigation ceased on-site, then the irrigated wetland is considered the "normal circumstances" on the property and would meet the definition of wetlands. The wetland, in whole or in part, meets the definition of a wetland under the Manual.

Irrigated areas that meet the definition of a wetland under the Manual are potentially subject to jurisdiction under Section 404 of the CWA. A wetland is considered jurisdictional if it meets the definition of waters of the U.S. in accordance with 33 CFR Part 328.3 and related guidance provided by the Corps and EPA.

A handwritten signature in black ink, appearing to read 'M. Jewell', with a stylized, cursive script.

Michael S. Jewell
Chief, Regulatory Branch